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In the Supreme Court of the United States

OCTOBER TERM, 1922

No. [redacted] 114

JAMES C. DAVIS, Agent, United States Railroad Administration,
Petitioner,

vs.

THE PORTLAND SEED COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals of the 9th Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1922

No. 573.

JAMES C. DAVIS, Agent, United States Railroad Administration,
Petitioner,

vs.

THE PORTLAND SEED COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals of the 9th Circuit.

STATEMENT OF THE CASE.

This case involves a violation of the long and short haul clause of the Interstate Commerce Act arising by reason of two shipments of alfalfa seed, both of which originated at Roswell, New Mexico, one destined to Yakima, Washington, the other to Walla Walla, Washington. They both moved over the lines of the A. T. & S. F. from originating point to Denver, Colorado, thence via the Union Pacific Railroad, Oregon Short Line Railroad and Oregon-Washington Railroad & Navigation line to destination. These shipments were charged for at the rate of $2.44 per cwt. At the same

time the shipments moves there was in effect a rate from Pecos, Texas, to the same points of destination of $1.51½ per cwt. on the same commodity over the same route. Pecos, Texas, is a point on the A. T. & S. F. Railway System on the same line as Roswell, New Mexico, but further distant from Yakima and Walla Walla than Roswell, and shipments from Pecos, Texas, to said destinations move through Roswell, New Mexico.

There is no dispute between the parties as to the shipments being made, nor as to the amount of the recovery if the petitioner is entitled to recover anything. The District Court gave judgment for $379.09, the amount of the overcharge on the Yakima shipment, with interest from the date of payment; and $177.87, the amount of the overcharge on the Walla Walla shipment, with interest from date of payment; and $175.00 attorney's fees and costs. The Circuit Court of Appeals affirmed the judgment with $100.00 additional attorney's fees.

This case was consolidated with and tried both in the District Court and in the Circuit Court of Appeals, in connection with two cases now here on writ of error, one being The San Francisco and Portland Steamship Company, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error, No. 594; and James C. Davis, Plaintiff in Error, vs. A. J. Parrington, De-

fendant in Error, No. 595' of the October, 1922, Docket, and practically all questions involved in this case should be determined and controlled by the decision of this court in the two cases named, which have not as yet been argued. We will therefore not make any extended argument in this brief, as it would be but repetition of our argument in the two cases just named.

ARGUMENT.

I.

The District Court had original jurisdiction in this case. This question has been fully argued in the briefs in Docket Numbers 594 and 595.

The 4th Section of the Act to Regulate Commerce at the time the shipments here involved moved prohibited the charging of greater compensation for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer, except upon application to the Interstate Commerce Commission for an order prescribing the extent to which the carrier may be relieved from the operation of said section, and it has been held that the amendment of this section of 1910 made the prohibition of the 4th Section absolute, and that after the time fixed

by the section the existing rate to the shorter point was illegal unless permitted by a special order of the Interstate Commerce Commission.

Inter Mountain Rate Cases 234 U. S., 476, 482, 484.

U. S. vs. Louisville & Nashville, 235 U. S. 314, 322.

Skinner & Eddy. Corp. vs. U. S. 249 U. S., 566.

Where there is no administrative question involved it is not necessary to submit the question to the Interstate Commerce Commission, but action may be brought directly in court.

Penn. R. R. Co. vs. International Coal Co., 230 U. S., 184.

Penn. R. R. Co. vs. Puritan Coal Co., 237 U. S., 121.

Penn R. R. Co. vs. Sonman, 242 U. S. 120.

St. Louis, Iron Mountain & Southern Railway Co. vs. Hasty, 255 U. S., 252.

Great Northern Railway Co. vs. Merchants Elevator Co., 259 U. S., 285, 296.

Section 8 of the Interstate Commerce Act provides that in case any common carrier subject to the Act causes to be done or permits to be done any act, matter or thing in said act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in said act required to be done, such common carrier shall be liable to the person or persons injured thereby to the full amount of damages sustained in consequence in violation of the provisions of said act, together with reasonable counsel's or attorney's fees to be fixed by the Court in every case, which attorney's fees shall be taxed and collected as a part of the costs in the case.

Section 9 of the Act gives the right to any person claiming to be damaged to make complaint either to the Commission or to bring suit for damages in the District Court of the United States.

In the present case the record shows a rate of $1.51½ established from Pecos, Texas, to Walla Walla and Yakima (Tr. P. 27). It shows that Pecos, Texas, is on the system of the Atchison, Topeka & Santa Fe south of New Mexico. Roswell, New Mexico, is on the same line of this system and intermediate between Pecos and the destination points over the route which the shipments in question moved. The rate charged on the shipments from Rosswell was $2.44 per 100 pounds, being a combination of local rates; that the carriers made a charge of 92c per 100 pounds on these shipments

more than the rate established by them from Pecos, Texas, over the same line or route to the same destinations. There was no pretense in the record that any order of the Interstate Commerce Commission had been passed permitting such higher charge from the intermediate point. The rules of the Interstate Commerce Commission require any such order to be referred to on the title page of the tariff and no such reference on the tariffs in question was shown (Tr. P. 28), and no order of the Commission was offered in evidence to justify the higher rate from the intermediate point.

II.

THE EFFECT OF THE FEDERAL CONTROL ACT AND TRANSPORTATION ACT

It is argued on pages 29 to 37 of brief of petitioner that inasmuch as when the carriers were taken over by the Railroad Administration the rates of the carriers on file with the Commission were continued in effect and an order in June, 1918, was made increasing the rates in effect 25 per cent. that thereby the violation of the long and short haul clause of the 4th Section of the Act was validated, notwithstanding the fact there had been no special order by the Commission permitting the particular violation. This argument is based upon the exception in Section 10 of the Federal Control Act

making all carriers while under federal control subject to laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provision of said act, or any other act applicable to such federal control or with any order of the President.

We submit however, that this question is not raised by the record. The only objection made to the complaint was by demurrer on the ground that the court had no jurisdiction of the subject matter of the action, and in this demurrer it it was specified that in presenting the demurrer the defendant would rely upon the proposition that the Interstate Commerce Commission has exclusive original juisdiction of controversies of this character (Tr. P. 13). The answer was simply a denial. No objection was offered to the introduction of the tariffs showing rates from the more distant point, in fact there was no reservation of the question here attempted to be presented.

Aside, however, from the fact that the question is not raised, we submit that Section 10 of the Federal Control Act did not validate the violation in question. Under federal control it was contemplated that the operation of the railroads should continue the same as before; tariffs had to be filed making changes in rates from time to time in the ordinary course of business. In fact, as appears from Mo. Pac. R. R. Co. vs. Ault,

256 U. S. 560, each system was required to file its own tariffs. The initiation or continuation of a rate in this manner was not an order of the President inconsistent with the Act to Regulate Commerce. On the contrary, it was an express recognition that the provisions of the act governed. The only exception recognized by Section 10 was that any rates initiated by the President should not be suspended pending investigation before the Commission as to their reasonableness or justness. The Railroad Administration recognized that its rates were subject to the long and short haul provision of the 4th Section. It applied in specific cases to the Commission for relief thereunder. When the Railroad Administration by General Order 28 increased all rates in effect 25 per cent. it recognized that certain of said rates were higher for a short haul over the same route than for longer hauls under permits granted by the Commission, and that a percentage increase in the rates would necessarily increase the violation, and to legalize the increase it applied to the Commission for permission to increase this violation necessary to permit the increase to go into effect, and such permission was granted. The character of the violations permitted by this order was specifically called to the attention of the Commission, and the Commission's order was for the purpose of validating such violations as were made or increased by the advance in rates.

The action of the Director General, the agent of the President, in recognizing the fact that the Railroad Administration was subject to the long and short haul clause, is persuasive as a contemporaneous interpretation of the Act. He evidently did not consider that initiation of rates by him on the basis contrary to the Fourth Section without the order of the Commission was necessary to enable him to carry out the Federal Control Act. Not only did the President's agent so interpret the Federal Control Act, but the Interstate Commerce Commission so interpretated it at the time.

In the case of Johnson vs. A. T. & S. F. Ry. Co., 51 I. C. C. 356, 361, the Commission says:

> "Question has been raised as to our power to consider at this time applications filed by carriers for relief from the provisions of the fourth section of the Act to regulate commerce. It is suggested that those provisions are inconsistent with the purpose of the Federal Control Act of March 21, 1918, and the full exercise of power conferred thereby. That Act expressly provides that rates initiated by the President 'shall be reasonable and just'. Under Section 4 of the Act to regulate commerce certain widely prevalent forms of unjust, unreasonable, and unduly prejudicial charges are condemned and the burden is placed upon the carriers of showing that the situations apparently within the scope of the

prohibition are in reality 'special cases', justifying the exercise by us of sound legal discretion in authorizing departures from the general rules laid down. It is difficult to see how the enforcement of this section can interfere with a unified, co-ordinated national control, or in any wise hinder the prosecution of the war. As the situations covered by the fourth section can be reached by orders under the first three sections of the Act to regulate commerce, the suggestion is equivalent to saying that we can not do in form what it is lawful to do in substance. These applications were filed by the carriers in accordance with the provisions of the Act to regulate commerce. During their pendency they extended a protection to those carriers in maintaining rates that would otherwise have been unlawful. The applications were not withdrawn by the Director General when he assumed control of the railroad and he has obtained the benefit of whatever protection those applications may have afforded. In this connection it may be remarked that the Director General sought and obtained from us four-section relief as an incident to the rates, fares, and charges initiated by him in his General Order No. 28.

"The Act to regulate Commerce remains in full force and effect except in so far as it may be inconsistent with the provisions of the Federal Control Act or other acts applicable to Federal control or

with any order of the President. There has been no order of the President in the exercise of his war powers declaring that the enforcement of Section 4 interfered with the efficient operation of railroads and systems of transportation under Federal control. Clearly no such declaration is contained in the Act itself and any contention to that effect must be based upon a process of deduction. As to this it is sufficient to say that had the Congress intended to change the effect of Section 4 it must be presumed that language appropriate to that end would have been used as was done with the power of suspension under Section 15."

The Director General was not a party to the Johnston case, but in a case arising approximately at the same time in which the same question was involved, and in which the Director General was a party, the Commission reiterates and approves its language above quoted in the Johnston case. Rice Potato Co. vs. B. & O. Rld. Co., 51 I. C. C. 365, 368. This interpretation also seems to comport with the language of this Court in the case of Missouri Pacific Rld. Co., vs. Ault, 256 U. S. 554, 559 as follows:

"The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the

President except in so far as such rights or remedies might interfere with the needs of federal operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917; to cases where the cause of action arose before that date and the suit against the company was filed after it; and to cases where both cause of action and suit had arisen or might arise during federal operation. The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analogous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control.

"This purpose Congress accomplished by providing that 'carriers while under federal control' should remain subject to all then existing laws and liabil-

ities and that they might sue and be sued as theretofore. Here the term 'carriers' was used as it is understood in common speech; meaning the transportation systems as distinguished from the corporations owing or operating them."

This case was an action to recover compensation and a penalty, and while the Court held that the government did not assume to pay penalties, it made clear that it was the purpose of the government to permit itself to be sued on all causes of action for compensatory damages. On Page 563 the Court says:

"By these provisions the United States submitted itself to the various laws, state and federal, which prescribe how the duty of a common carrier by railroad should be performed and what should be the remedy for failure to perform. By these laws the validity and extent of the claims against the United States arising out of the operation of the railroad were to be determined, but there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the government for a penalty if it should fail to perform the legal obligations imposed. The government undertook as a carrier to observe all existing laws and undertook to compensate any person injured through a departure by its agents or servants from their duty under such law."

And again, on Page 564:

> "The purpose for which the government permits itself to be sued was compensation not punishment. * * * Wherever the law permits compensatory damages they may be collected against the carrier while under federal control. Such damages may reasonably include interest and costs."

And the judgment was reversed only because it included the penalty, for the Court says on Page 565: "The judgment against the Director General so far as it provided for recovery of the penalty was erroneous."

In this connection the language of Section 10 not only expressly subjects the carriers to all laws and liabilities, except such as are inconsistent with the Federal Control Act, or any other act applicable to Federal Control, or with any order of the President, but it further provides that "actions at law or suits in equity may be brought by and against such carriers and judgment rendered as now provided by law. And in action at law or suit in equity against the carrier *no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.*"

The Act contemplates as declared by the Ault case that actions against the carrier should proceed the same as before, and in the same Courts, and that the Director General should not defend any action on the ground that he was an agency of the Federal Government. The

object of the legislation was that the Director General's control of the properties should not be interrupted, and this seems to be the interpretation placed upon the Act by the Director General, by the Interstate Commerce Commission, and by all having an interest in the matter.

It is urged in this same connection in the brief of plaintiff in error that the Transportation Act of 1920, Section 206, indicates that the jurisdiction of these matters was transferred from the Court to the Commission, but as we read Section 206 of the Transportation Act, it is a confirmation of the above interpretation of the Federal Control Act, and shows to our mind the intention of Congress that the jurisdiction of all controversies remained in the same Courts or tribunals as before or during Federal Control. The language of the Act is so plain that we submit that it is susceptible of no other interpretation. The District Court in this case (Transcript, Page 18) has outlined the proper interpretation thereof to our mind so plainly as to require no further argument on our part. His language is as follows:

> "It is urged that under the provisions of the Transportation Act, all claims for damages by reason of the collection or enforcement by or through the President during the period of federal control, of rates, fares, etc., must be by application to the Commission and not to the court. Section 206, subdiv.

a, of the act, provides that actions at law, suits in equity and proceedings in admiralty based on causes of action arising out of the possession, use, or operation by the president of the railroad or system of transportation of any carrier of such character as prior to federal control could have been brought against the carrier may, after the termination of federal control, be brought against an agent designated by the President for such purpose. Subdivision B provides for process in such cases; subdivision C, for proceedings before the Commission; subdivision D, that any pending action shall not be abated; subdivision E, for payment of final judgment, decree, or awards in actions, suits, proceedings, or reparation claims; subdivision F, takes the period of federal control out of the statute of limitations; and subdivision G forbids an execution against the property of the carrier. In other words, the Transportation Act does not change the jurisdiction of any cause of action on account of the subject matter, but provides for the bringing of proceedings against the agent appointed by the President in the same tribunal which would have had jurisdiction of the subject matter but for federal control.

"As the present actions could have been maintained this court against the carrier if the lines had been in private control at the time the shipments

were made, they can proceed against the agent of the President with reference to shipments moving during the period of federal control.

We submit that neither the Federal Control Act nor the Transportation Act validated the violation of the Interstate Commerce Act and did not change the jurisdiction of the cause from the court to the Commission.

III.

IT IS NOT NECESSARY TO PROVE ACTUAL SHIPMENTS FROM THE MORE DISTANT POINT.

It is claimed that there was no violation of the Act because there was no proof of actual shipments from Pecos to Walla Walla or Yakima. We have in the brief, with reference to Docket Numbers 594 and 595, Page 36 et seq., discussed the question as to the necessity for proof of shipments from or to the more distant point. We deem it unnecessary to repeat that argument at length.

Section 6 of the Act requires the rates established by the carrier to be published and requires all persons to take notice thereof. The law prohibits the establishment of a higher rate from the intermediate point except after hearing before the Commission and an order permitting such departure from the long and short haul

clause, and in U. S. vs. Louisville & Nashville, 235 U. S. 322 and 3 this court has held that after the time limit fixed by the amendment of 1910 any rate from the intermediate point higher than from the more distant point should not "continue in force unless the application to sanction it had been made and granted". The question of any movement under the rate made no difference. The higher rate from the intermediate point was not in force, hence proof of shipments from the more distant point would be superfluous. Furthermore, the courts hold that the establishment of the rate from or to the more distant point and the publication thereof in accordance with law, is in law deemed to be the charging of the rate. Cal. Adj. Co. vs. A. T. & S. F., 179 Cal. 140; 175 Pac. 682; Beeghly vs. Public Util. Comm. (Ohio), 135 N. E. 641. This holding was applied in the lower courts.

IV.

THE DEPARTURES IN QUESTION WERE NOT AUTHORIZED BY THE INTERSTATE COMMERCE COMMISSION.

It is now claimed that the Interstate Commerce Commission 4th Section Order No. 7316 granted authority to the Director General to violate the long and short haul clause in all respects. At the time of the general advance of 25 per cent. in the rate the Director

General requested of the Interstate Commerce Commission, and the Interstate Commerce Commission made an order permitting the increased rates to go into effect notwithstanding the fact that said increased rates in some instances violated the long and short haul clause. This order is set out on pages 42 and 43 of the petitioner's brief. This order was necessary because where violations of the 4th Section existed by reason of orders of the Commission prior to this increase the extent of the violation by the increase in rates was necessarily increased. In other cases violations arose by reason of the rule for splitting of fractions in establishing the increase which made the order necessary, but there was no consideration given to the facts warranting any higher rate to be charged from Roswell, New Mexico, than from Pecos, Texas, to points in Washington. No circumstance of this character was before the Commission or considered by it. The 4th Section of the Interstate Commerce Act permits violations in cases permitted by the Commission, providing . . . "that upon application to the Commission such common carrier *may in special cases after investigation* be authorized to charge less for a longer than a shorter distance for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this Section."

This court has stated in U. S. vs. Merchants Assn., 242 U. S. 187, that this clause "was designed to guard against the issuance by the Commission of general orders suspending the long and short haul clause, and to insure action by it separately in respect to particular carriers and only after consideration of special circumstances existing". No such special circumstances concerning the situation of the rates here involved were before the Commission and no order permitting this violation was ever made. The rate claimed to be increased from Roswell, New Mexico, did not in fact exist at the time of the alleged increase (U. S. vs. Louisville & Nashville, 235 U. S. 322), and the order certainly did not revive a non-existing rate.

This point was not raised in the court below, was nowhere pleaded, no evidence of any order of the Commission was offered in the record, and we submit it is not before this Court for consideration. Robinson vs. B. & O. R. R., 222 U. S. 511. This point was attempted to be raised in the Circuit Court of Appeals by brief filed by Ben C. Dey as amicus curiae, but the Circuit Court of Appeals refused to consider it because not in record (Tr. P. 51).

V.

MEASURE OF DAMAGES.

It is claimed that the measure of damages is not the difference between the rate established from the

more distant point and that charged from the nearer point.

The rate from the more distant point was the only rate in existence. The higher rate from the intermediate point did not exist. U. S. vs. L. & N. R. R. 235 U. S. 314, 322. Any charge therefore, in excess of the established rate from the more distant point was an illegal exaction which the person who has paid is entitled to recover. The Circuit Court of Appeals has applied this measure of damage in Southern Pacific vs. Calif. Adjustment Co., 237 Fed. 954. The Supreme Court of California has likewise applied the same measure of damages in Calif. Adjustment Co. vs. Atchison, Topeka & Santa Fe, 185 Pac. 282, and the Supreme Court of Kentucky in the case of L. & N. R. R. Co. vs. Walker, 110 Ky. 961, 63 S. W. 20, has likewise applied the same measure.

The Interstate Commerce Commission in refusing to grant damages on this basis justifies its course on the language of this court in Penn. R. R. Co. vs. International Coal Mining Co., 230 U. S. 184. This case was an action for damages because one shipper had not received a rebate equivalent to that granted by the railroad company to another shipper who had received a rebate, under the lawful rate, and the court quite properly held that in such case the rebates received under the lawful rate was not the measure of damages. This dis-

tinction is clearly outlined by the Circuit Court of Appeals of the 9th Circuit in Calif. Adjustment vs. S. P. 237 Fed. 965, and this court in the later case of Southern Pacific vs. Darnell Taenzer, 245 U. S. 534, likewise distinguishes the International Coal case.

The respondent here has paid out of pocket cash which the statute says should not be exacted from him. He is to that extent damaged and that is the damage which he is seeking to recover.

VI.

ATTORNEY'S FEES IN THIS COURT.

If the judgment of the lower court is sustained, then this Court should assess as part of the costs, attorney's fees in this Court. Section 8 of the Act provides for the assessment of a reasonable counsel's or attorney's fees to be fixed by the court in every case of recovery, which fees shall be taxed and collected as part of the costs in the case. The District Court limited the attorney's fees to the fees in that court. The Circuit Court of Appeals made an additional allowance for fees in that court and we suggest that similar allowance be made in this court. This seems to be the practice outlined in Mills vs. Lehigh Valley, 226 Fed. 812, and N. Y., N. H. & H. vs. Ballou & Wright, 242 Fed. 862.

We therefore submit that the judgment of the Circuit Court of Appeals should be affirmed, with addition of attorney's fees in this Court.

Respectfully submitted,

JAMES G. WILSON,

Attorney for Respondent.